In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 930

PAULYNE B. MCCALL, AS THE ADMINISTRATRIX OF THE ESTATE OF VIRGIL C. MCCALL, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. A13–A17) is not reported. The opinion of the court of appeals (Pet. App. A29–A40) is reported at 338 F. 2d 589.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1964. The petition for a writ of certiorari was filed on February 23, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

768-104—65

QUESTION PRESENTED

Whether, in refusing to impose liability against the United States under the Federal Tort Claims Act, both courts below properly interpreted and applied the governing Washington law of *respondeat superior* to hold that the serviceman here involved, who was driving his personal automobile while on leave to a new duty station, was not acting within the scope of his employment.

STATUTES INVOLVED

The Federal Tort Claims Act provides in pertinent part:

> SECTION 1346. (28 U.S.C. 1346) *United States as defendant.*
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> * * * * *
>
> (b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
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> * * * * *
>
> SECTION 2671. (28 U.S.C. 2671) *Definitions.*
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> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—
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> * * * * *

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

SECTION 2674. (28 U.S.C. 2674) *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

STATEMENT

Petitioner brought this action under the Federal Tort Claims Act for damages for the death of her husband, who was struck and killed in the State of Washington by an automobile owned and driven by Ray E. Grantham, Storekeeper 1st Class in the United States Navy. The district court found that Storekeeper Grantham's negligence proximately caused the death of Mr. McCall (Pet. App. [illegible]).

Grantham's duties as Storekeeper "did not involve his driving or otherwise operating a motor vehicle" (Pet. App. A24). The accident occurred while Grantham was on leave and was driving from his

home in Hayward, California, to Bremerton, Washington, to report on board the USS BON HOMME RICHARD. Grantham was engaged in a "no cost transfer" from another ship at his own request (Pet. App. A21–A22) "for purely personal reasons" (Finding 32, Pet. App. A24) pursuant to the Navy's "SWAP" program, which is defined in the Navy's Enlisted Transfer Manual, Chapter 16, as follows (Pet. App. A30–A31):

> "16.11 Definition.
>
> "A no cost transfer is defined as a personal movement authorized for the convenience of the individual involved, and effected at no expense to the Government. Government transportation for the man, his dependents and household effects is not authorized, nor is payment of a dislocation allowance. Such transfers must be effected during periods of leave (except for hospital patients) and no proceed time or travel time is authorized."

Thus not only was the trip made while Grantham was on leave, but the Navy paid none of Grantham's travel expenses (Pet. App. A14, A24–A25) and Grantham was free to make the trip by any means he chose (Pet. App. A22–A31).[1]

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[1] The trip was made on April 1, 1963, twelve days before Grantham was required to report (Pet. App. A22). The transfer order issued to Grantham contained the following language:

"NO EXPENSE TO THE GOVT IS AUTHORIZED IN CONNECTION WITH THESE ORD[ER]S, IN CASE YOU DO NOT DESIRE TO BEAR THE EXPENSE YOU WILL REGARD THIS AUTHORIZATION AS REVOKED" (Pet. App. A31).

The district court, noting that it was "well aware that the Washington law of *respondeat superior* is controlling here," concluded after trial that it was "convinced that the courts of the State of Washington would not impose liability" under the facts of this case (Pet. App. A15, A23). The complaint was accordingly dismissed (Pet. App. A27). The court of appeals affirmed after a careful "review of many decisions of the Supreme Court of Washington, involving the doctrine of *respondeat superior*" (Pet. App. A37).

ARGUMENT

Petitioner necessarily relies on the contention that the decisions below misapply and misinterpret the *respondeat superior* law of Washington.[2] In fact, however, the decision of the court of appeals (affirming the district court) that Storekeeper Grantham was not within the scope of his employment because "the driving of an automobile by Grantham was not the kind of work that he was employed by the United States to perform, nor required by his contract of employment, nor by the direction of the United States" (Pet. App. A39) is fully supported by the

[2] Both courts below accepted Washington law as controlling. Petitioner's suggestion (Pet. 11) that the district court applied a federal common law test, instead of the *respondeat superior* law of Washington, is unfounded. To the contrary, the district court fully recognized that "[t]he law of Washington is applicable to all substantive issues of this case" (Finding 28, Pet. App. A23).

Washington cases.[3] Further review of this uniform application of State law by the courts below is unwarranted. *Propper* v. *Clark,* 337 U.S. 472, 486–487; *Estate of Spiegel* v. *Commissioner,* 335 U.S. 701, 707–708.

Nor does the decision below conflict with that of any other court of appeals. *Hinson* v. *United States,* 257 F. 2d 178 (C.A. 5), and *Cooner* v. *United States,* 276 F. 2d 220 (C.A. 4), relied on by petitioner, involved the *respondeat superior* law of States other than Washington. In addition, they did not concern servicemen transferring under the "SWAP" program, where the transfer is a "personal movement authorized for the convenience of the individual involved" (*supra,* p. 4).

Finally, the court of appeals properly held, as required by this Court's decision in *Williams* v. *United States,* 350 U.S. 857, that the term "line of duty" as used in the Tort Claims Act does not justify an imposition of liability on the United States broader than that established by the applicable State law of *respondeat superior.* See also, *Merritt* v. *United States,* 332 F. 2d 397 (C.A. 1); *United States* v. *Hainline,* 315 F. 2d 153 (C.A. 10), certiorari denied, 375 U.S. 895; *United States* v. *Campbell,* 172 F. 2d 500 (C.A. 5), certiorari denied, 337 U.S. 957.

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[3] *E.g., Greene* v. *St. Paul-Mercury Indemnity Co.,* 51 Wash. 2d 569, 573, 320 P. 2d 311, 314 (1958); *Roletto* v. *Department Stores Garage Co.,* 30 Wash. 2d 439, 443, 191 P. 2d 875, 877 (1948); *Brazier* v. *Betts,* 8 Wash. 2d 549, 561, 113 P. 2d 34, 39 (1941).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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